STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 20, 2007
v	No. 265109 Berrien Circuit Court
GARY WILLIAMS, Defendant-Appellant.	LC No. 2004-406246-FC

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

This case involves defendant's armed robbery of a Domino's Pizza restaurant, resulting in the fatal shooting of a Domino's employee. Defendant appeals as of right from his jury trial convictions for felony murder, MCL 750.316(b), armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant first argues that the trial court denied him a fair trial by allowing two prosecution witnesses to testify after they were interviewed by the prosecutor together, in violation of the sequestration order. We review for an abuse of discretion a trial court's decision on a motion for a mistrial. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). "A trial court should grant a mistrial 'only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *Id.* at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). Here, defense counsel moved for a mistrial on the basis that a violation of the sequestration order occurred when the prosecutor interviewed two witnesses in the same room. The trial court conceded that it would have been better practice to interview each of the witnesses separately, but noted that while the challenged testimony was predominantly similar, it was different in regard to defendant's cellular phone: Jameel McGee testified that defendant initially had a cellular phone with him, but claimed he had lost it later in the evening. Dajuan Rimpson first testified that defendant initially had a cellular phone with him, but when confronted with prior testimony, he stated that defendant initially had two cellular phones with him, but only had one with him later in the evening.

The trial court did not abuse its discretion in denying defendant's motion for a mistrial on the basis that the sequestration order was violated, where the "irregularity" neither prejudiced defendant's rights nor impaired his ability to get a fair trial. *Bauder*, *supra* at 195. The testimony of McGee and Rimpson was similar, and could be attributed to the prosecutor's

questioning them in the presence of one another. Indeed, Rimpson's testimony regarding defendant's cellular phone only diverged from McGee's testimony when confronted with his prior testimony. However, a third witness, Johnny Lee Bonds, Jr., corroborated the testimony of McGee and Rimpson. Specifically, regarding the cellular phone, Bonds testified that defendant initially had a phone, but that, later in the evening, defendant did not have a phone. Defendant is unable to demonstrate that the trial court's denial of his motion for a mistrial on the basis that a violation of the sequestration order occurred deprived him of a fair and impartial trial.

Defendant next argues that there was insufficient evidence of his identity as the perpetrator to sustain his convictions. We review de novo challenges to the sufficiency of the evidence to determine whether, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). We will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Here, the perpetrator dropped his cellular phone at the crime scene, and defendant was the "major donor" of DNA found on the phone. Call records revealed that the phone had been used to make calls to, and receive calls from, people associated with defendant. Darius Kyle testified that the perpetrator was a young, masked, African-American male wearing a gray hooded sweatshirt. This was corroborated by the store's video surveillance tape as well as testimony from McGee, Rimpson, and Bonds. McGee and Bonds also testified that while defendant had his cellular phone with him when he first came to the party, he did not have it with him when he returned to the party. Further, McGee, Rimpson, and Bonds testified that defendant lost all of his money gambling in a dice game earlier in the evening, but later in the evening he was gambling again with a large amount of money. Finally, Lewis testified that defendant inquired about details of the restaurant that would be helpful to committing a robbery up until the night of the incident. These communications were corroborated by phone records evidencing calls made to, and from, defendant's cellular phone, which was recovered from the crime scene. Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented from which the jury could find beyond a reasonable doubt that defendant was the perpetrator.

Defendant also argues that error occurred in the admission of evidence of his flight. Defendant failed to object to the admission of evidence of this evidence at trial; therefore, the issue is unpreserved. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review unpreserved claims of nonconstitutional error for plain error affecting substantial rights. *Id*.

Evidence of flight may be used to show consciousness of guilt. *People v McGhee*, 268 Mich App 600, 613; 709 NW2d 595 (2005). See also *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The term 'flight' encompasses running from the police as well as leaving the jurisdiction. *Id*. Before other-acts evidence under MRE 404(b) may be introduced, the prosecution must offer the evidence for a proper purpose, the evidence must be relevant, and the danger of undue prejudice cannot substantially outweigh its probative value. *McGhee*, *supra* at 609. "Evidence of an attempt to avoid arrest and flight in a criminal case is relevant, material, admissible, and can lead to an inference of guilt." *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982).

Here, the prosecution introduced evidence of defendant's flight to demonstrate defendant's consciousness of guilt. Specifically, the prosecution introduced evidence that defendant fled from the police through a window at his aunt's house, went to a "safe house" in South Bend, Indiana, and was ultimately apprehended in Atlanta, Georgia. "Because flight is probative of consciousness of guilt, the evidence was relevant." *McGhee*, *supra* at 639 (citations omitted). Further, the probative value of the evidence of defendant's flight was not substantially outweighed by unfair prejudice. See *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). Additionally, juries are presumed to follow their instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000), and the trial court instructed the jury that evidence of defendant's flight did not prove guilt, that a person may run or hide for innocent reasons or because of consciousness of guilt, and that the jury had to decide whether the evidence was true, and, if true, whether it showed that defendant had a guilty state of mind. Defendant has forfeited the issue by failing to demonstrate that the admission of evidence of flight amounted to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant next argues that defense counsel's failure to timely subpoena or secure known exculpatory and alibi witnesses for trial amounted to ineffective assistance of counsel, where the missing testimony affected the outcome of the trial. Defendant failed to move for a new trial or *Ginther*[1] hearing in the trial court, and this Court denied his two motions for remand;[2] therefore, this issue is unpreserved, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). If the appellate record does not support defendant's assertions, he has waived the issue. *Id*.

A failure to call witnesses can constitute ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant claims, for the first time on appeal, that three witnesses would have testified that he was with them at the party at the time of the incident, and that one witness would have testified that two prosecution witnesses collaborated their testimony to place defendant at the crime scene. In support of these assertions, defendant inappropriately attempts to enlarge the record on appeal by appending the affidavits of four individuals, as well as his own affidavit, to his brief. *People v Nash*, 244 Mich App 93, 99; 625 NW2d 87 (2000); *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000). However, we are limited on appeal to reviewing only the lower court record. MCR 7.210(A)(1). Because the record does not contain sufficient detail to support defendant's ineffective assistance of counsel claim, he has effectively waived the issue. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Finally, defendant argues that during rebuttal argument, the prosecutor improperly attacked the integrity of defense counsel and denigrated the defenses presented at trial. Defendant failed to preserve the issue by objecting to the alleged instances of prosecutorial

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] *People v Williams*, unpublished orders of the Court of Appeals, entered June 20, 2006 and August 29, 2006 (Docket No. 265109).

misconduct. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*. at 448-449.

A prosecutor may not suggest that defense counsel intentionally attempted to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, the prosecutor's comments must be considered in light of defense counsel's comments. *Id*. at 592-593. An otherwise improper remark may not rise to an error requiring reversal where the prosecutor is responding to defense counsel's arguments. *Id*. at 593. Here, the prosecutor's challenged remarks were made in rebuttal to defense counsel's closing argument, which proposed two alternate defense theories: alibi or accident. The prosecutor's comments did not suggest that defense counsel was intentionally trying to mislead the jury. Rather, the prosecutor's comments merely indicated his skepticism of the alternate defense theory of accident advanced for the first time during closing argument. The prosecutor's challenged remarks were proper in light of the evidence and the theories presented, see *Ackerman*, *supra* at 454, and defendant has forfeited the issue by failing to demonstrate plain error affecting his substantial rights. *Carines*, *supra* at 763.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski
/s/ Christopher M. Murray